



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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MAY 17 2019

Memorandum

To: Margaret Everson
Principal Deputy Director Exercising the Authority of the Director
Fish and Wildlife Service

From: Daniel H. Jorjani
Principal Deputy Solicitor

Subject: Waiver from Requirements of S.O. 3368

On July 6, 2018, the Center for Biological Diversity (CBD) filed a complaint against the Fish and Wildlife Service (FWS) alleging that FWS missed the statutory timeframe to propose critical habitat (CH) under the Endangered Species Act (ESA) for four mussel species: the rayed bean, sheepnose, snuffbox, and spectaclecase. *CBD v. U.S. Fish and Wildlife Service*, No. 1:18-cv-01568 (D.D.C.). The FWS listed the rayed bean and snuffbox as endangered species on February 14, 2012, stating that the critical habitat was not determinable at that time (77 FR 8632). It listed the sheepnose and spectaclecase as endangered species on March 13, 2012, also finding critical habitat not determinable for those species (77 FR 14914). The ESA provides that FWS must publish a final critical habitat designation concurrently with a final listing decision, unless FWS finds that critical habitat is not then determinable, in which case FWS has one additional year to publish the final critical habitat designation. ESA § 4(b)(6)(C). The FWS has taken no action to designate critical habitat for these species since determining that critical habitat was not determinable at the time of listing.

Since FWS exceeded the statutory time frame, there is no defense against this deadline challenge. Rather, the options are for FWS (1) to ask the court for a remedy date that it could meet and hope that, based on supporting evidence that FWS provides, the court would order that the FWS submit a proposed CH by that date if prudent, or (2) to enter into a settlement agreement with plaintiffs that establishes a remedy date that FWS could meet. On February 4, FWS's Principal Deputy Director exercising the authority of the Director, Margaret Everson, concurred with the recommendation from the Department of Justice, Office of the Solicitor, and FWS personnel to pursue settlement of this litigation by offering to submit a proposed determination concerning critical habitat for these species to the Federal Register by November 30, 2024, and, if that determination is in the form of a proposed rule to designate critical habitat, to submit a final critical habitat determination for these species to the Federal Register by November 30, 2025. CBD has tentatively accepted this offer. Because a settlement agreement would include date(s) that place an obligation on the FWS and the Department that extends beyond five years, compliance with Sections 4(a)(4) and 4(a)(5) of Secretarial Order 3368, *Promoting Transparency and Accountability in Consent Decrees and Settlement Agreements* (the

Order, or S.O. 3688), is required. Compliance with those sections of S.O. 3688 would require the FWS to publish a notice of the proposed settlement agreement in the Federal Register, and provide a public comment period of at least 30 days.

The requirements of S.O. 3688 may be waived, however, in whole or in part, by the Secretary, Deputy Secretary, or Solicitor, upon a determination in writing that doing so is in the best interest of the Department and is consistent with the Department's statutory authority, sound principles of democratic accountability, and constitutional separation of powers. S.O. 3368, at § 4(c)(3). FWS has requested that the requirements of sections 4(a)(4) and 4(a)(5) of the Secretary Order be waived with respect to this agreement. I have determined that such a waiver is in the best interests of the Department and meets the standards for a waiver pursuant to Section 4(c)(3) of the Order. The agreement establishes specific deadlines for what is already a mandatory duty—completing critical habitat determinations for the four species that are the subject of the litigation. Entering into the agreement, rather than risking a court order that could establish a shorter deadline, will allow the FWS to adhere to its workplan and thereby focus its conservation resources on species that FWS has already determined would substantially benefit from the protections of the ESA. Applying Sections 4(a)(4) and 4(a)(5) would prolong the process for entering into the settlement agreement, incur the additional cost and employee time of making further filings in this case, and potentially delay or hamper FWS's ability to secure manageable deadlines that will minimize any disruption to work scheduled on the work plan. Therefore, waiver is in the interest of the Department and is consistent with the Department's statutory authority. Further, waiver is consistent with sound principles of democratic accountability. Waiver will not impede the public's involvement in the actions at issue in this litigation because FWS will be required in the future to provide the public with notice and an opportunity to comment, as it must do for any proposed critical habitat designation. Finally, waiver would not infringe upon the constitutional separation of powers.

This waiver is limited to sections 4(a)(4) and 4(a)(5) of S.O. 3688. Compliance with the other requirements in S.O. 3688 would not delay or hamper settlement in this case because the settlement agreement is already fully consistent with the remainder of the Order. For example, consistent with Section 4(b) of the ESA, the requirement and timing for these four critical habitat designations are already a mandatory duty under the ESA, so the agreement does not convert into a mandatory duty an otherwise discretionary authority of the Secretary. Similarly, the Anti-Deficiency Act provision in the agreement ensures that it does not commit the Department or the Service to expend unappropriated or unbudgeted funds, and the agreement does not include a provision for attorneys' fees. Finally, the agreement does not prohibit public disclosure of its terms.

Therefore, pursuant to S.O. 3368 4(c)(3), I hereby grant FWS a waiver from the requirements of S.O. 3688 sections 4(a)(4) and 4(a)(5) as they pertain to the settlement of *CBD v. U.S. Fish and Wildlife Service*, No. 1:18-cv-01568 (D.D.C.).